

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Thomas & Betts Power Solutions, L.L.C.,
formerly Danaher Power Solutions, L.L.C.,
Plaintiff and Counterclaim-Defendant,
v.
Power Distribution, Inc.,
Defendant and Counterclaim-Plaintiff

Case No. 3:07cv167 (HEH)

MEMORANDUM SUPPORTING
MOTION TO EXTEND EXPERT REPORT DUE DATES

Power Distribution, Inc (referred to herein as "PDI") hereby provides this Memorandum in support of the "Motion to Extend Expert Report Due Dates" (filed herewith) for both PDI and Thomas & Betts Power Solutions, L.L.C. (referred to herein as "TBPS"). by thirty days.

This page is followed by a table of contents, a table of authority and an argument.

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ARGUMENT

PDI seeks to establish that there were no noninfringing alternatives available on the market at the time of the alleged infringement by TBPS, in support of an award of lost profits. Additional discovery is required in regard to products that were reportedly offered for sale by two non-parties, which may be substitutes for the patented product. It is believed that this discovery can be completed within thirty days, and a corresponding extension is requested.

The original Counterclaim was filed on May 3, 2007, and alleges infringement of Claims 1, 2, 5 and 6 of U.S. Patent No. 6,330, 516 (referred to herein as “the ‘516 patent” and “the patent in suit”). At the request of the parties, the court construed the term “circuit board” in the patent claims. See the Order [docket no. 32] and Memorandum and Opinion [docket no. 31] dated August 13, 2007 (referred to herein as the “court’s construction of the term circuit board”). The parties have indicated that no further terms in the patent Claims need to be construed. The parties initially expected that the court’s construction of the term “circuit board” would be likely to result in resolution of the case, but that resolution has not yet been realized. A Motion for Summary Judgment of Noninfringement, and a Motion to Amend Counterclaim, are each pending.

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I. THE RULES PROVIDE FOR AN EXTENSION.

Federal Rule of Civil Procedure 6 provides in pertinent part that “the court for cause shown may ... order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order”

II. THERE IS CAUSE TO GRANT THE EXTENSION.

PDI as patentee is entitled to seek lost profits. The statute provides for “damages adequate to compensate for the infringement, but in no event less than a reasonable royalty” 35 U.S.C. §284. This may include the lost profits of patentee. *Datascope Corp. v. SMEC, Inc.*, 879 F.2d 820, (Fed. Cir.), *cert. denied*, 493 U.S. 1024 (1990) (“this court's precedent that a successful claimant may recover its lost profits where it shows it would have made the sales but for the infringing activity,” at 822). In order to obtain lost profits, the patentee must prove *inter alia* the “absence of acceptable noninfringing substitutes.” *Id.* at 823.

PDI took a deposition under Federal Rule of Civil Procedure 30(b)(6) of TBPS on September 28, 2007. TBPS produced one witness, Mr. Withers. His testimony indicates that TBPS has used branch circuit monitor systems from three sources: (1) PDI, the patentee; (2) Veris, a licensee of the

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patentee; and (3) TBPS. His testimony further indicates that the accused products sold by TBPS, are of the type that could have been purchased from PDI but for the alleged infringement.

PDI has received information that two non-parties may be offering for sale a branch circuit monitor system that may be a substitute for the patented branch circuit monitor system. These two non-parties are not believed to be located within the Eastern District of Virginia, but are believed to be located in the United States. PDI needs additional time to obtain more detailed information about the products offered by these two non-parties.

The granting of the present motion is not expected to result in a request to extend the close of discovery on December 7, 2007 (see paragraph 14 on page 2 of the Supplemental Scheduling Order dated June 26, 2007 [docket no. 17]).

The granting of the present motion is not expected to result in a request to extend the trial date of March 24-26, 2008 (see paragraph 37 on page 2 of the Supplemental Scheduling Order dated June 26, 2007 [docket no. 17]).

This memorandum is submitted in accord with both the format requirements of paragraph (F)(3) of Local Rule 7 (March 14, 2007).

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CONCLUSION

PDI respectfully submits that the Motion to Extend Expert Report Due Dates should be granted.

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Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

If the court's CM-ECF system does not serve the persons listed below electronically by an email NEF as expected, then the undersigned hereby certifies that a copy of this document will be served on Thomas & Betts Power Solutions, L.L.C. by sending a copy by first class U.S. mail addressed to their counsel of record as listed below on the undersigned date:

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